RECORD AND BRIEFS

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Supreme Court of the United States

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KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,

Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,

Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

BRIEF OF *AMICUS CURIAE* JEWISH SOCIAL POLICY ACTION NETWORK IN SUPPORT OF THE GOVERNMENT

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INTEREST OF *AMICUS CURIAE*

The Jewish Social Policy Action Network ("JSPAN") is a non-profit organization dedicated to protecting the constitutional and civil rights of minorities and the vulnerable. It strives to reflect the Jewish obligation to engage in *tikkun olam*, the "repair of the world."[1]

JSPAN's interest in this case stems from the longstanding commitment of the American Jewish community to the promotion of religious pluralism and the free expression of religion by citizens of diverse faiths, and to the protection of the public health and welfare. As stated in the *amicus* brief JSPAN filed with this Court supporting the constitutionality of the minimum coverage provisions of the Affordable Care Act ("ACA"), Jewish tradition considers among its core teachings the essential role of the community in caring for the sick:

> Preserving life and health is one of the highest of communal duties in the Jewish tradition, taking precedence even over the construction of a synagogue.[2]

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1. Letters of consent to the filing of *amicus* briefs in support of either party or neither party have been lodged with the Clerk of the Court by the government and by Conestoga. Counsel for Hobby Lobby has also consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* states the following: (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amicus*, its members, or its counsel, contributed money intended to fund the brief's preparation or submission.

2. *Br. of Amici Curiae Jewish Alliance For Law & Social Action, et al.*, at 1, *Dep't of Health & Human Servs. v. Florida*,

Thus, supporting the right to adequate healthcare and health insurance for all Americans, including the right of women to access reproductive healthcare, is a core value of the American Jewish community.

A. JSPAN IS DEEPLY COMMITTED TO PROTECTING THE INTERESTS OF MINORITY FAITHS AND ALL THOSE WHO WISH TO EXPRESS THEMSELVES ON MATTERS OF CONSCIENCE.

For most of the last two thousand years, Jews lived as minority communities in countries where religion and state were one. Under both Christendom and Islam, Jews faced discrimination, persecution, expulsion or worse. Faith was frequently invoked to limit Jews in all manner of business and commerce, excluding Jews from certain professions or confining them to others. The United States was different. Here, one could be both fully an American and, at the same time, fully Jewish. Still, even less than a generation ago in this country, deeds for real property prevented sales to Jews and service businesses refused to serve Jewish patrons. *E.g.*, *Mayers v. Ridley*, 465 F.2d 630, 631 n.2 (D.C. Cir. 1972); Harold Earl Quinn & Charles Young Glock, *Anti-Semitism in America* vii (1979).[3]

(2012) (No. 11-398) (consolidated with *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012)).

3. Quotas also were used to limit admission of Jews to private universities, including medical and law schools. In 1922, A. Lawrence Lowell, President of Harvard University, proposed the use of such quotas to limit Jewish admissions. *Anti-Semitism in the U.S.: Harvard's Jewish Problem*, http://www.jewishvirtuallibrary.org/jsource/anti-semitism/harvard.html (last visited Jan. 27, 2014);

Mindful of this history, Jews have been at the forefront of efforts to expand civil liberties and promote equality in all spheres, including commerce. JSPAN is especially sensitive to the careful balance that must be maintained so that the religious interests of one group do not run roughshod over the rights and interests of others. It seeks to ensure both the protection of religious liberty *from* government and the facilitation of equality *through* government

B. ENSURING THE PUBLIC HEALTH, INCLUDING THE REPRODUCTIVE HEALTH OF WOMEN, IS AT THE CORE OF JEWISH VALUES AND TRADITIONS.

Judaism teaches that promoting health and well-being is both a communal duty and a duty for each individual Jew. Elliot N. Dorff, *Matters of Life and Death: A Jewish Approach to Modern Medical Ethics*, at 31-32 (Jewish Publication Soc'y, 1st ed., 1998). The concern for health in Jewish tradition has also led to the development of Jewish commentaries on a host of medical ethics questions facing modern society. Jewish scholarship addresses such issues as in vitro fertilization; sperm donation; surrogacy; whether to provide medical therapy to someone with terminal illness; the use of implantable medical devices derived from non-kosher animals; blood donation and

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Edward C. Halperin, *The Jewish Problem in U.S. Medical Education 1920-1955*, Journal of the History of Medicine and Allied Sciences, Vol.56, No. 2, at 140-167 (April 2001). Quotas at Yale University persisted until as late as the 1960s. Elyssa Folk, *For Jews at Yale, a struggle to be accepted*, Yale Daily News (April 4, 2001), http://yaledailynews.com/blog/2001/04/04/for-jews-at-yale-a-struggle-to-be-accepted/.

transfusion; decisions to remove life support; decisions to employ or not employ extraordinary measures to preserve life; genetic testing; and autopsies. *See, e.g.*, The Rabbinical Assembly, Committee on Jewish Law and Standards, *Opinions on Marriage and Fertility*, http://www.rabbinicalassembly.org/jewish-law/committee-jewish-law-and-standards/even-haezer (last visited January 26, 2014).

Judaism's emphasis on communal and individual health is particularly reflected in the important role Jewish women activists played in the contraceptive movement since its inception in the early 20th century. Rebecca Davis, *American Birth Control Movement*, Jewish Women's Archive, http://jwa.org/encyclopedia/article/american-birth-control-movement (last visited January 26, 2013). Studies spanning multiple decades also reflect that American Jewish adults have long been committed to family planning, and supportive of access to the full range of FDA-approved reproductive healthcare options. *See* William D. Mosher & Calvin Goldscheider, *Contraceptive Patterns of Religious and Racial Groups in the United States, 1955-76: Convergence and Distinctiveness*, Studies in Family Planning, Vol. 15, No. 3, at 107 (May/June 1984) (noting, in a study comparing contraceptive practices among various religions, that "[t]he proportion using contraception is highest among Jewish women (76 percent)"). Indeed, Judaism's emphasis on ensuring mental and physical well-being comports with granting women the freedom to make contraceptive choices that persons of other faiths may not endorse. *See, e.g.*, Jacob Berkman, *The Morning After Pill and Judaism*, http://www.myjewishlearning.com/beliefs/Issues/Bioethics/Abortion/Parameters/0The_Morning_After_Pill.shtml

(last visited Jan. 26, 2014) (noting general acceptance of Plan B by Jewish groups). Ensuring all women reproductive choice remains a central concern of the American Jewish community. *Jewish Views on Women's Rights & Reproductive Choice*, http://www.reformjudaism.org/jewish-views-womens-rights-reproductive-choice (last visited January 26, 2014).

This is not to say that all Jews answer questions of medical ethics in the same way.[4] Still, Jewish teaching on both public and private healthcare matters is just that – Jewish – an outgrowth of faith, religious law, and tradition. Such teaching may, but should not be presumed to, align with the teaching of other faiths or with the views espoused by those advocating a secular humanist approach to matters of medical ethics.[5]

Because of its own religiously-based roots, JSPAN appreciates that for the Hahn and Green families, like all people of faith, deeply held religious convictions may find expression in matters of health, and specifically

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4. There are multiple denominations within Judaism, reflecting a spectrum of beliefs and practices. Even those within the same branch of Judaism often interpret the obligations of religious commandments differently. Free exercise protects this diversity. *See, e.g., Thomas v. Review Board of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.").

5. Judaism is, for example, notably unlike religions that advocate faith healing or otherwise eschew modern medicine to treat disease and prevent death. Far from questioning the authority of human beings to intervene in God's plan to cause or heal illness, Judaism treats protecting and preserving the health of others as a commandment. Dorff, *supra*, at 325.

reproductive health, which may or may not be shared by others. Thus, there is a delicate balance to be struck lest the shield protecting each person's right of free expression become the sword cutting off the protected rights of persons of different faiths, or of no faith. JSPAN is committed to preserving that balance.

SUMMARY OF ARGUMENT

By granting for-profit corporations RFRA rights, the Court will be drastically expanding RFRA beyond its historical limitations and will set itself on a course it will ultimately regret. First, there is no statutory basis for limiting Conestoga's and Hobby Lobby's reasoning to family-owned businesses; if their arguments are embraced, any for-profit corporation could invoke RFRA. Second, extension of RFRA to for-profit corporations will result in a morass of litigation to make sense of just how a secular for-profit business operation exercises religion based on the beliefs of its owners. Third, extending RFRA to for-profit corporations would potentially call into question a vast array of federal laws that extend substantive rights to individuals regardless of their personal religious views. Were the Court to expand RFRA in this manner, it would upset the delicate balance that has been struck that allows America to function as a pluralist democracy in which one individual's right of religious expression does not cut off the protected rights of persons of different faiths.

ARGUMENT

I. CONESTOGA'S AND HOBBY LOBBY'S REASONING WILL CREATE AN UNPRECEDENTED AND HARMFUL SHIFT IN THE DELICATE BALANCE BETWEEN RELIGIOUS EXERCISE RIGHTS AND OTHER FEDERALLY PROTECTED INTERESTS.

Passed in response to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), RFRA is an extraordinarily broad statute. It allows "persons whose religious exercise is substantially burdened by government" to avoid any federal law or regulation unless the government can show *both* a "compelling governmental interest" and that the challenged provision represents "the least restrictive means of furthering that . . . interest." 42 U.S.C. §§ 2000BB(b)(2); 2000BB-1(b). The legitimate intent of Congress was to restore as a matter of statutory grant the scope of protection for religious exercise that had previously existed under *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). But that restoration did not provide protections that reached further. As this Court observed, RFRA "adopts a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). RFRA, likewise, cannot change the fact that "governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (citing *Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985)).

Conestoga and Hobby Lobby seek to characterize their RFRA claim as, at most, a modest step in religious exercise jurisprudence. Describing as deeply personal the relationship between the Hahn and Green family members and the corporations they own, Conestoga and Hobby Lobby essentially argue that, *for religious exercise purposes only*, distinctions between the corporate entities and the individual family members should be ignored. They assert that the corporations are merely one of many means through which the family members practice their faith, and that the family members should be as free to express their religious beliefs through their businesses as through any other aspect of their lives. *See, e.g., Conestoga, Br. for Petitioners*, at 12 ("The Hahns are a Mennonite Christian family whose faith permeates their entire lives."); *Hobby Lobby, Br. for Respondents on Petition for Cert.*, at 2 ("The Greens commit to '[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.'").

The Government's brief, as well as the opinion of the Third Circuit in *Conestoga*, provide excellent discussions of how this reasoning turns a basic principle of corporate law on its head. Whereas the law recognizes that owners and employees of a corporation perform their corporate duties solely as agents of the corporation, the Hahns and Greens claim the reverse – that the actions they take on behalf of Conestoga and Hobby Lobby are made by them as individuals and necessarily implicate their personal religious values and goals. Under existing law, the Hahns and Greens cannot have the best of both worlds. They cannot enjoy the benefits of the corporate form for all of their for-profit business purposes, yet also maintain that the corporations are mere extensions of, and conduits

for, the expression of their faith when they wish to vindicate free exercise rights under RFRA. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013) *cert. granted*, 134 S. Ct. 678 (2013) ("The corporate form offers several advantages . . . but in return, the shareholder must give up some prerogatives, 'including that of direct legal action to redress an injury to him as primary stockholder in the business.'"); *Hobby Lobby, Br. for Petitioners*, at 23-26 (citing *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001)) ("As this Court has emphasized, 'incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.'").

JSPAN writes separately on this issue to make three additional points. First, if "person" includes for-profit corporations under RFRA, there is no basis upon which a holding in Conestoga's and Hobby Lobby's favor can be confined to closely-held family businesses. The unavoidable consequence of their reasoning is that *any* for-profit corporation, whether large or small, public or private, family-owned or publicly-traded, will be able to use the expansive power of RFRA to gain exemption from any otherwise neutral federal law.[6] Second, the

6. Conestoga and Hobby Lobby also rely on free speech jurisprudence, particularly this Court's decision in *Citizens United*, as precedent for their claim that corporations have free exercise rights. This reliance is misplaced. Free speech is about the right of all members of society to participate in the market place of ideas. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 334 (2010) (chilling speech harms "society as a whole, which is deprived of an uninhibited marketplace of ideas."). Free exercise, by contrast, is

extension of RFRA rights to for-profit corporations based on the religious beliefs of the individuals who own those corporations will be entirely unworkable and will draw the federal courts into increasingly strained efforts to justify the extension of RFRA to secular for-profit businesses. Third, extending RFRA to for-profit corporations will create a fundamental shift in the delicate balance between religious exercise rights and other federally protected interests.

A. CONESTOGA'S AND HOBBY LOBBY'S REASONING WOULD ENABLE ALL FOR-PROFIT CORPORATIONS TO BRING RFRA CLAIMS.

Conestoga and Hobby Lobby argue that RFRA should apply to closely held businesses owned by members of a single, religiously committed family.[7] The facts related to Conestoga and Hobby Lobby, however, provide little comfort that RFRA's reach into the secular business world will be limited. It is plain that Conestoga and Hobby Lobby are nothing like sole proprietorships or "d/b/a's" run by a family patriarch, with siblings and spouses pitching

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about conscience – a fundamentally human right to express one's religious convictions. *See Hobby Lobby, Br. of Constitutional Accountability Center as Amicus Curiae in Support of Petitioners*, at 11-16.

7. Conestoga's sole question presented on appeal is "[w]hether the religious owners of a family business, or their closely-held business corporation, have free exercise rights. . ." *Conestoga, Petitioners' Br.*, at i. Hobby Lobby's question presented similarly states that "Respondents are a family and their closely held businesses, which they operate according to their religious beliefs." *Hobby Lobby, Br. for Respondents on Petition for Cert.*, at i.

in. They are major business enterprises operating in interstate commerce, with good reason to have elected the corporate form, accepting both its benefits and limitations. Conestoga employs 950 people. *Conestoga, Br. for Petitioners*, at 5. Hobby Lobby and its related company, Mardel, collectively employ approximately 13,400 people. *Hobby Lobby, Br. for Respondents on Petition for Cert.*, at 1. Although they focus on the decision-making authority of the founding family members, it is surely the case that many unrelated employees make decisions for the corporation in the course of their employment and have authority to bind the businesses in various ways. These non-family member employees are hired – as required by law – without regard to personal faith or religious practice. *See* 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion.") They are hired not to perform any religious duty, but to further the companies' efforts to sell wood cabinets and arts and crafts materials.

Beyond these facts, the basic statutory argument made by Conestoga and Hobby Lobby simply proves too much. If one accepts their claim that the Dictionary Act definition of "person" under RFRA includes for-profit corporations, there would be no statutory basis for limiting RFRA's reach. *Conestoga, Br. for Petitioners*, at 25. Nothing in the language of RFRA or the Dictionary Act[8] supports a conclusion that "person" includes

8. See, for example, the *amicus* brief submitted in support of Hobby Lobby in the Tenth Circuit by Wywatch Family Action, Inc. and Eagle Forum, 2013 WL 773285 at *26-28, which argues that

for-profit corporations owned by family members who share a single faith but does not include all other types of for-profit corporations. If "person" includes corporations pursuant to the Dictionary Act, then it will be argued that RFRA includes all for-profit corporations, whether family owned, owned by unrelated private parties, or owned by shareholders trading shares on a public exchange. Indeed, the definition would also include all "firms, partnerships, societies and joint stock companies." 1 U.S.C. § 1 (defining "person" as including "corporations, companies, associations, firms, partnerships, societies, and joint stock companies.")[9] Thus, if this Court were to allow RFRA claims to be brought based on Conestoga's and Hobby Lobby's statutory construction argument, it

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there is no constitutional basis, *a priori*, to deny religious exercise rights to publicly traded corporations.

9. Conestoga also argues that the definition of "person" under RFRA is informed by RLUIPA, which applies to both a "person" and an "entity." *Conestoga, Br. for Petitioners*, at 25. But the term "entity" within RLUIPA is found only in the section related to land use and buildings and must be understood within that proper context. Specifically, section 2000cc-5(7)(B) clarifies that in matters involving the "use, building, or conversion of real property" the "religious exercise" claim belongs to the "person or entity that uses or intends to use the property" for a religious purpose. 42 U.S.C. § 2000cc-5(7). The focus of RLUIPA was the real problem of discrimination in local zoning practices restricting land access for religious persons, "including a religious assembly or institution." 42 U.S.C. § 2000CC(a)(1). RLUIPA was not concerned with the interests of for-profit secular entities, such as corporations selling wooden cabinets or art supplies. RLUIPA's reference to "entity" simply cannot be used to justify an expansive reading of "person" under RFRA. *See Anselmo v. Cnty. of Shasta, Cal.*, 873 F. Supp. 2d 1247, 1264 (E.D. Cal. 2012) ("the court has been unable to find a single RLUIPA case protecting the religious exercise rights of a non-religious organization such as Seven Hills.")

would embark down a slippery slope from which it would be hard to return.[10]

B. GIVING FOR-PROFIT CORPORATIONS RIGHTS UNDER RFRA WILL CREATE A HOST OF LEGAL PROBLEMS NEVER ENVISIONED BY CONGRESS.

At the time Congress adopted RFRA in an effort to create a statutory end-run around this Court's decision in *Smith*, the established law was stated by this Court in *United States v. Lee*, 455 U.S. 252, 261 (1982): "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Smith* in turn spoke of free exercise rights not relieving the "individual" of "his" duty to comply with "valid and neutral laws of general applicability." *Smith*, 494 U.S. at 879. The lack of any body of law recognizing a right of a for-profit corporation to exercise religion should give this Court pause.

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10. This Court need not reach the issue, which may arise in very rare cases, of whether a for-profit corporation that expressly serves a religious communal interest might have a RFRA claim because a federal law burdens its ability to serve that religious communal interest. Examples include a funeral home seeking to prepare a body for burial without autopsy or a kosher butcher shop seeking to slaughter animals under rabbinic standards. Neither of these examples would turn on the religious exercise rights of the owners of the business, but rather on the religious rights of members of the community or the religious rights of the customers.

Extending RFRA rights to for-profit corporations based on the beliefs of their owners will be entirely unworkable and will draw the Court into increasingly untenable efforts to explain how corporations founded to make profits and engaged in secular business activities have religious "beliefs" or engage in the "exercise" of religion. Examples of questions that will inevitably flow from such a decision include:

- Who determines the beliefs of a for-profit corporation owned by family members who share the same faith but adhere to different levels of observance and follow different practices?

- What happens when different generations of the same family, through intermarriage or otherwise, no longer share the same faith as the founding generation?

- Whose beliefs constitute the beliefs of a private for-profit corporation owned by unrelated individuals of different faiths?

- Can a simple majority of shareholders of a for-profit corporation determine the RFRA claims to be asserted by the corporation?

- Can a corporation have a RFRA claim if a significant minority, but no majority, of owners asserts a burden on the corporation's religious interests?

- Can shareholders of a corporation that are themselves corporations or partnerships determine the RFRA claims it should assert?

- Can pension funds for religiously affiliated institutions determine the RFRA claims of for-profit corporations in which they invest?

- Do the religious "beliefs" of the corporation change with each change in ownership and control, thus changing the applicable RFRA analysis, and will federal law have to accommodate accordingly?

- How should a court respond if some shareholders are motivated by religion while others are motivated by "personal and philosophical" views?[11]

- Will a single employee with the authority to act on behalf of the corporation be able to use RFRA to challenge a federal law that is binding on the corporation, but not him individually?

- Does that employee have to be an owner or at a management level or could someone who merely authorizes health insurance payments for the corporation bring a RFRA claim?

Even asking these questions reveals the intellectual gymnastics one must engage in to hold that a corporate owners' religious beliefs can be imputed to a for-profit corporation, or that a for-profit corporation has religious exercise rights it can vindicate, derivative of its owners' religious beliefs.

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11. In *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972), this Court held that only beliefs rooted in religion are protected by the Free Exercise Clause, while those that are personal and philosophical are not. As the Court noted, such determinations "may present a most delicate question." *Id.* at 215.

C. GIVING FOR-PROFIT CORPORATIONS RIGHTS UNDER RFRA WILL CREATE A FUNDAMENTAL SHIFT IN THE DELICATE BALANCE BETWEEN RELIGIOUS EXERCISE RIGHTS AND OTHER FEDERALLY PROTECTED INTERESTS.

There is hardly anything the government can do, from mandating contraceptive coverage to naming a bridge, that will not draw the objection of someone on religious grounds.[12] Conestoga's and Hobby Lobby's arguments threaten to burden the federal government with justifying, on a case-by-case and challenge-by-challenge basis, virtually every federal rule and regulation governing business, potentially creating a web of contradictory rulings and favoring religion over irreligion. At the same time, granting RFRA rights to corporations will threaten the delicate balance of religious and other civil liberty interests that is at the core of our pluralistic society.

Almost any religious exercise right asserted by a corporation has the potential to impact the federally protected interests, including religious rights, of the corporation's employees and others with whom it interacts. As immediate proof of this problem, one need only look to the Tenth Circuit's rationalization that Hobby Lobby objects to "only" four of twenty potential contraceptive options. *Hobby Lobby Stores, Inc. v. Sebelius*, 723

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12. See Joann P. Kreig, *Democracy in Action: Naming a Bridge for Walt Whitman*, Walt Whitman Quarterly Review, vol. 12, No. 2, 108 at 111 (1994), which describes objections raised on religious grounds to naming a bridge after Walt Whitman because, among other things, he was homosexual, "held Christianity in contempt," and "attempted to teach rebellion against the natural law of God." *See also Catholics Decry Whitman Bridge*, N.Y. TIMES, December 17, 1955, at 16.

F.3d 1114, 1144 (10th Cir. 2013) *cert. granted*, 134 S. Ct. 678 (U.S. 2013). The Tenth Circuit cites no basis for its judgment regarding how many FDA-approved contraceptive options, which a doctor might advise and prescribe in light of contemporary medical standards for reproductive healthcare, a woman should be able to do without. At the same time, other employers have challenged the reproductive healthcare mandate in other courts and objected to offering coverage for any birth control options or sterilization within their plans. *E.g.*, *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013).

Must the federal government accommodate all of these competing requests or entirely forfeit the option of covered contraception? Is the elimination of four of twenty options a request the government must accommodate but six or eight of twenty not? Does it matter what the basis is for the religious objection? For example, does it make a difference if the employer's religious objection derives from a belief that unmarried women should not have access to contraceptive services under the ACA because they should not be sexually active, rather than from a belief about when life begins? *See Eisenstadt v. Baird*, 405 U.S. 438, 454, (1972) (relying on the Equal Protection Clause to invalidate a ban on providing contraceptives to unmarried persons).

As discussed in Judge Rovner's well-reasoned dissent in *Korte v. Sebelius*, 735 F.3d 654, 689-93 (7th Cir. 2013), it is also the case that many different religious objections, unrelated to contraception, could be raised to

the ACA, undermining any federal system of ensuring comprehensive employee health insurance. Consider the following examples:

- A devout Methodist that follows the United Methodist Church's teachings on stem cells could use RFRA to hamper access to trial studies for employees suffering from life-threatening diseases.

- A for-profit corporation owned by a member of the Church of Christ, Scientist could invoke RFRA to claim that it was willing to provide healthcare benefits, but those must be in accordance with the religious exercise of the corporation and therefore must be limited solely to readings provided by a Christian Science practitioner.

- A company owned by a Hindu or Greek Orthodox might object to a plan that covers use of heart valves from animal parts.

- A company owned by a Jehovah's Witness may complain that its plan should not cover blood transfusions, or that its plan should cover in vitro fertilization only if the donor is married to the recipient.

Frankly, even the same employer could seek conflicting or inconsistent exemptions to the ACA depending on changes in doctrinal teachings of the religious institution to which it purports to adhere, or a natural progression in its owner's level of religious adherence. These examples do not take into account the myriad quirks in coverage

under the ACA that federal law might be required to accept based on the doctrine of lesser-known religious faiths, faiths that have not yet been created, or various idiosyncrasies in the practice of known faiths, all of which are equally covered by the protections of RFRA. *See, e.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) ("[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference."); *Thomas v. Review Board of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) ("The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.").

Beyond the ACA, the full range of federal laws and regulations is potentially impacted, as seen by RFRA challenges brought in lower courts or before administrative bodies by organizations claiming to be of a religious nature. In *Ukiah Valley Medical Center*, 332 N.L.R.B. 602 (N.L.R.B. 2000), the employer asserted that RFRA precluded the NLRB from asserting jurisdiction over it because it followed the teachings of the Seventh Day Adventist faith which prohibited it from recognizing, bargaining with, or even operating with the presence of a labor union. The NLRB rejected the employer's claim and there was no appeal. This kind of challenge could well be raised again with renewed force by a for-profit corporation claiming that religion infuses all aspects of its business practices.

Similarly, in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), the Court of Appeals did not reach the RFRA issue in a case in which a Catholic university argued that the NLRB could not invoke jurisdiction over it. Instead, the court determined that the university was exempt from NLRB jurisdiction under this

Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Court of Appeals then noted:

> Under *Catholic Bishop*, the NLRB must determine whether an entity is altogether exempt from the NLRA. We have laid forth a bright-line test for the Board to use in making this determination. However, a ruling that an entity is not exempt from Board jurisdiction under *Catholic Bishop* may not foreclose a claim that requiring that entity to engage in collective bargaining would "substantially burden" its "exercise of religion." 42 U.S.C. § 2000bb-1(a). Moreover, even if the act of collective bargaining would not be a "substantial burden," RFRA might still be applicable if remedying a particular NLRA violation would be a "substantial burden." As none of these questions are properly before us, we need not explore them further.

278 F.3d at 1347. Privately owned for-profit companies such as Conestoga and Hobby Lobby will not be able to satisfy this Court's test in *NLRB v. Bishop of Chicago*; but every business with a religious objection will be able to challenge the NLRB's jurisdiction. It will then fall to the various courts of appeals, and perhaps this Court, to determine which specific aspects of the National Labor Relations Act are supported by a compelling interest and are sufficiently narrowly tailored as to be valid under RFRA.[13] The broad potential impact on the statutory

13. It is not only the Seventh Day Adventist faith which opposes unions. Since at least 1927, the Protestant Reformed Church

scheme created by the NRLA is nowhere contemplated in the legislative history of RFRA.

The possibility of invoking RFRA also implicates federal employment discrimination laws. Consider the corporation that claims its religious exercise requires that "during the early years of a child's growth, the mother's place is in the home." *See Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932, 935 (6th Cir. 1985). An employment policy embodying this rule would no doubt violate the ban on sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a). Surely the federal government has a compelling interest in outlawing gender discrimination in employment. But using the logic Conestoga and Hobby employ here, an employer might note that Title VII includes exemptions and exclusions for certain categories of employers — including religious employers – and so might raise a host of issues regarding whether Title VII is sufficiently narrowly tailored.

Given ongoing opposition to same-sex marriage on religious grounds, it also is not hard to imagine how, in light of this Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013), owners of a for-profit corporations might

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determined that "unions undermine the God-given authority of the employer." See David J. Engelsma, Professor of Dogmatics in the Protestant Reformed Seminary, *Labor Membership in the Light of Scripture*, (May 2003) http://www.prca.org/pamphlets/pamphlet_86.html. Some members of the Church of Jesus Christ of Latter-Day Saints have also claimed a religious objection to unions. See, e.g., *In re Whitmer*, Case 23447-N-10-0062, Decision 11026 – PECB, (Wash. Public Emp. Relations Comm'n March 24, 2011), http://www.perc.wa.gov/databases/ulp/11026.htm.

invoke RFRA as protecting their desire not to provide benefits to same-sex couples.[14] If for-profit corporations can invoke RFRA, then the federal government will need to show not only a compelling interest in mandating these benefits, but also will have to show that the myriad reporting and disclosure obligations of ERISA satisfy the least restrictive means of furthering that interest.

The same issues obtain for members of our Armed Forces and their families, insofar as many people object to providing any support for military activities on religious grounds. *See Jenkins v. Comm'r*, 483 F.3d 90 (2d Cir. 2007). Owners of for-profit corporations who have such objections may well not wish to have their companies provide any support to employees who seek to take time off from work pursuant to the military family provisions of the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.*[15]

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14. *See also* U.S. Dept. of Labor, Emp. Benefits Sec. Admin., *Technical Release No. 2013-04, Guidance to Employee Benefit Plans on the Definition of "Spouse" and "Marriage" under ERISA and the Supreme Court's Decision in United States v. Windsor*, (Sept. 18, 2013) ("the term 'spouse' will be read to refer to any individuals who are lawfully married under any state law, including individuals married to a person of the same sex.") http://www.dol.gov/ebsa/newsroom/tr13-04.html; *Cf. Cozen O'Connor, P.C. v. Tibits*, Civil Action No. 11-0045, 2013 WL 3878688 (E.D. Pa. July 29, 2013), (holding that *Windsor* entitles same-sex spouses to ERISA benefits where the employer's profit sharing plan did not define the term "spouse")

15. U.S. Dept. of Labor, Wage & Hour Div., *Fact Sheet #28: The Military Family Leave Provisions under the Family and Medical Leave Act*, (Revised Feb. 2013) ("A covered employer must grant an eligible employee up to 12 workweeks of unpaid, job-protected leave

Consider also, for example, a challenge under RFRA to federal environmental laws. Could not an owner of a for-profit corporation invoking Genesis 1:28 as a commandment to have "dominion" over the earth and to "subdue it" (King James Bible) challenge one or more aspects of the scheme of federal environmental regulation? Similarly, one may expect challenges to public accommodation laws, like the ones in the District of Columbia prohibiting discrimination on the basis of marital status. D.C. Human Rights Act of 1977, as amended, D.C. Official Code Section 2-1401.01 *et seq.*

In short, granting RFRA rights to for-profit corporations would dramatically expand the potential for free exercise claims and leave the government to repeatedly justify the trade-off between corporate religious exercise rights, a workable and fair scheme of federal regulation needed to advance the general good, and the rights of individuals, both religious and secular. Moreover, because corporate decisions are much more likely than individual decisions to impact the rights of others, extending RFRA to for-profit businesses will lead to numerous challenges arising from competing constitutionally protected interests. *See Hobby Lobby*, 723 F.3d at 1144 (acknowledging that by Hobby Lobby's refusal to comply with the contraceptive mandate it was "in effect, imposing their religious views on their employees or otherwise burdening their employees' religious beliefs."); *Tex. Monthly, Inc. v. Bullock*, 489

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during any 12-month period for qualifying exigencies that arise when the employee's spouse, son, daughter, or parent is on covered active duty or has been notified of an impending call or order to covered active duty."), http://www.dol.gov/whd/regs/compliance/whdfs28.htm.

U.S. 1, 18 n. 8, (1989) (plurality) (noting significance, in free exercise and establishment clause jurisprudence, of extent to which proposed exemptions for religious groups would burden the rights of third parties). The risk of harm to individual freedoms, including freedoms for religious minorities that free exercise was meant to protect, cannot be ignored.

II. RFRA HAS NEVER BEEN AND SHOULD NOT BE READ TO ALLOW A RELIGIOUS EXEMPTION TO A TAX, WHICH IS ALL THE ACA IMPOSES ON CONESTOGA AND HOBBY LOBBY.

In *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*") this Court upheld the ACA's individual mandate as constitutional in light of the alternative it provided of taxing those individuals who remained uninsured. As explained by Chief Justice Roberts, the Federal Government *does not have the power* to order people to buy health insurance. The Federal Government does, however, have the power to impose a tax on those without health insurance. The individual mandate is therefore constitutional because it can reasonably be read as a tax. *Id.* at 2601. Subsequently, in *Liberty University, Inc. v. Geithner*, the Supreme Court directed the Fourth Circuit to consider the constitutionality of the employer mandate in light of its holding in *NFIB*. 133 S. Ct. 679 (2012). Applying the reasoning of *NFIB*, the Fourth Circuit noted that the employer mandate was also a tax and thus constitutional. *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 95 (4th Cir. 2013) *cert. denied*, 134 S. Ct. 683 (2013). Employers are not compelled by the ACA to purchase health insurance; nor are they penalized

for not purchasing health insurance. As explained well in the *amicus* brief drafted by Americans United for Separation of Church and State, employers who choose not to purchase health insurance for any reason, including a religious objection, have the option of paying a tax of $2000 per year for 30 fewer than the employer's total number of full-time employees, an amount that would likely be less than the cost of insurance.[16] *See Br. of Faith Groups As Amici Curiae Supporting the Government.*

Were this Court to grant Conestoga's and Hobby Lobby's challenge to the ACA, it would represent an unprecedented extension of RFRA, allowing a for-profit corporation to avoid an otherwise neutral and non-penal tax. In *Jenkins v. Commissioner*, 483 F.3d 90, 91 (2d Cir. 2007), for example, the taxpayer sought to withhold part of his tax obligation until it could be directed to a purpose other than military spending, which he found objectionable on religious grounds. The Tax Court granted summary judgment and the Second Circuit affirmed.

Even more analogous, in *Adams v. Commissioner*, 170 F.3d 173, 174-75 (3d Cir. 1999), the Third Circuit affirmed the Tax Court's determination that Adams, a devout Quaker, was not exempt from payment of taxes under RFRA, and was liable for deficiencies and penalties assessed against her. Adams did not refuse to pay taxes,

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16. Even if the alternative tax imposed an additional cost, this would not make it invalid. "It is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely operates so as to make the practice of the individual's religious beliefs more expensive." *Goodall by Goodal v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) (internal quotation marks omitted).

she merely did not want her money directed to military expenditures. The court found that her religious exercise was not substantially burdened and rejected Adam's accommodation argument, asking the court to direct her tax dollars to only non-military purposes:

> [Adams] asserts that she would voluntarily pay all of her federal income taxes if the money she paid were directed to a fund that supported only non-military spending, or if her payments could be directed to nonmilitary expenditures, or that, with the consultation of a clearness committee, she would be willing to consider any other form of accommodation of her beliefs that could be offered by the government.

Id.

Any objection that Conestoga or Hobby Lobby might have to the alternative tax optior of the ACA is even less compelling than that in *Adams*. In fact, Conestoga and Hobby Lobby both rather surprisingly argue that an alternative to the ACA obligation would be for the federal government to provide women with the contraceptive services to which the Hahns and Greens object. *Conestoga, Br. for Petitioners*, at 3; *Hobby Lobby, Br. for Respondents on Petition for Cert.*, at 34-35. From where would the money for such services come, other than the government's authority to tax? Having admitted, indeed argued, that federal government funds can be used to provide the full range of FDA-approved reproductive health options, it would strain credulity to grant a religious exemption from the alternative tax option of the ACA.

CONCLUSION

The Jewish community has worked tirelessly for decades to extend civil rights and protect individuals from being subjected to restrictions on their liberty to live their own lives based on the religious views of others – whether those restrictions were imposed by government or by private institutions seeking to impose the limits of someone else's faith on them. Extending the definition of "person" in RFRA to for-profit corporations would upset the delicate balance and lead us down a path where individuals could be deprived of federally protected rights because they did not share the religious views of the company's owners.

Respectfully submitted,

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